IN THE SUPREME COURT OF IOWA

No. 17-0460

(Floyd County No. SMCR025615)

STATE OF IOWA,

Plaintiff-Appellee,

vs.

CHAD DENNIS VANCE,

Defendant-Appellant.

APPEAL FROM THE IOWA DISTRICT COURT IN AND FOR

FLOYD COUNTY

THE HONORABLE PETER B. NEWELL, DISTRICT ASSOCIATE JUDGE

DEFENDANT-APPELLANT CHAD DENNIS VANCE'S FINAL REPLY BRIEF

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LEGAL ARGUMENT

I. THE MAGISTRATE'S EXTENSION OF THE NO CONTACT ORDER IS VOID BECAUSE THE MAGISTRATE LACKED SUBJECT MATTER JURISDICTION.

A. Argument.

In its Resistance to the Defendant's Application for Discretionary Review, the State acknowledged that magistrates do not have subject matter jurisdiction to extend no contact orders under section 664A.8, and argued that the associate district court, "in effect," granted the extension in this case. (State's Resistance to Application for Discretionary Review, p. 2, App. 60.) The State now reverses course.

The State asserts that the Court of Appeals was wrong when it twice held that magistrates do not have subject matter jurisdiction to extend no contact orders under Iowa Code section 664A.8. The State ignores not only the sound reasoning of the court of appeals, but also the plain language of Iowa Code section 602.6405, which defines the subject matter jurisdiction of magistrates. As the court of appeals has held, section 602.6405 does not confer subject matter jurisdiction upon magistrates to extend no contact orders under section 664A.8, and the State points to nothing in section 602.6405 to the contrary. The fact that section 602.6405 grants magistrates "jurisdiction of simple misdemeanors" does not mean the statute grants

jurisdiction to magistrates to extend no contact orders under section 664A.8. Section 664A.8 is not limited to simple misdemeanors and makes no reference to the nature of the underlying crime. The State argues that because simple misdemeanors are within the scope of chapter 664A, magistrates must necessarily have jurisdiction to extend no contact orders for five-year terms under 664A.8. This ignores the jurisdiction-granting purpose and language of 602.6405, and it also ignores the fact that chapter 664A only authorizes magistrates to issue temporary no contact orders. Iowa Code §664A.3.

The State attempts to construe disparate provisions of chapter 664A under the guise of *in pari materia*, but it does so selectively. Section 664A.3 only applies to temporary no contact orders to be entered by magistrates at the time of an initial appearance. Section 664A.5, which pertains to the entry of *permanent* no contact orders, is quite clear that the terms "court" and "magistrate" are not synonymous. That section specifically states that the "*court* shall either terminate or modify the *temporary* no-contact order issued by the *magistrate*." Iowa Code §664A.5 (emphasis added). This language makes it crystal clear that magistrates may issue temporary no contact orders under 664A.3, but it is only a "court" that may enter a permanent no contact order. Likewise, there is no reference to magistrates

in section 664A.8, and this section only empowers a "court" to extend a no contact order for a period of five years. Iowa Code §664A.8.

The State's citation to section 664A.7(5) is inapposite as this section merely classifies as a simple misdemeanor the crime of violating a no contact order. Said section makes no reference to magistrates, but only refers to courts.

The State makes the wildly exaggerated claim that it would be "wildly inefficient" to find magistrates do not have jurisdiction to extend no contact orders under section 664A.8. The scheme of chapter 664A contemplates that magistrates may only enter temporary no contact orders, and that jurisdiction to enter permanent no contact orders and to extend no contact orders is vested with judges. Efficiency is not the objective of chapter 664A, but having said that, efficiency would be achieved if the legislative scheme is consistently and uniformly applied.

Finally, the State's assertion that lack of jurisdiction by magistrates "would mandate cumulative presentation of evidence, and amplify burdens on courts . . ." is nonsense. A defendant is entitled to a hearing upon a motion to extend a no contact order, and the procedure and presentation of evidence would be the same regardless of whether a magistrate or a judge presides over the proceedings.

II. THE ASSOCIATE DISTRICT COURT COULD NOT LAWFULLY EXTEND THE NO CONTACT ORDER.

A. Argument.

The State again reverses course from its Resistance to Defendant's Application for Discretionary Review and claims that "now that the record of the proceedings has been fully compiled and made available, it has become clear that the district associate court was reviewing the magistrate's order on appeal under Rule 2.73(3) . . . ." While the State's excuse for its reversal is nonsensical given that the State was a participant at every level of these proceedings, it does appear the State at least now concedes that if the magistrate did not have subject matter jurisdiction, the district associate court could not lawfully extend the no contact order. It is true, as both parties have noted, that the associate district court was sitting as a court of appellate jurisdiction, whether or not it could lawfully extend the no contact order or affirm the magistrate. The fact of the matter is that the associate district court entered a ruling, and that ruling is part of the record that is reviewable by this court.

The State sets forth a confusing analysis and concludes that a petition for writ of certiorari is the proper vehicle for reviewing this matter. As already stated in Chad's initial brief, certiorari is one remedy available to Chad, but not the only remedy. The State acknowledges the obvious, which

is that this court has already granted discretionary review. There is nothing about the discretionary review rubric that would prevent this court from deciding the issues presented. The State simply prefers the certiorari remedy because it claims certiorari is a more limited remedy. There are no "jurisdictional land mines" that this court could not address upon either discretionary review or certiorari, but discretionary review would provide the court slightly more flexibility to address the important issues presented.

III. THERE IS NO RIGHT OF APPEAL FROM A VALIDLY EXTENDED NO CONTACT ORDER, BUT CHAD IS NOT WITHOUT A REMEDY.

A. Argument.

The parties appear to agree that no right of appeal exists from the extension of a no contact order in a simple misdemeanor case. For reasons stated by Chad in his initial brief, discretionary review and certiorari are appropriate remedies. As the State acknowledges, this court has already granted discretionary review, and it is entirely proper for the court to decide these issues as a matter of a discretionary review. The "infirmities" of the district associate court's appellate jurisdiction are not an impediment to discretionary review, but rather provide an additional reason for the court to exercise discretionary review. The State does not dispute that appellate review in some form is appropriate.

IV. IOWA CODE SECTION 664A.8 IS UNCONSTITUTIONALLY VAGUE BECAUSE IT FAILS TO DEFINE AND ALLOCATE THE BURDEN OF PROOF.

A. Preservation of Error.

The State alleges that the *Pettit* court made, "at best, an imprecise statement" when it held that "a no contact order, if contained in the original sentencing order, is part of the sentence and can be challenged at any time as an illegal sentence." State's Brief, p. 35 (*citing State v. Pettit*, 885 N.W.2d 221 (Table)(Iowa Ct. App., June 15, 2016) at p. 5). But for purposes of error preservation, the issues in *Pettit* were identical to the issues in this case.

The State claimed that *Pettit* had not preserved his burden of proof and vagueness claims because he did not raise these issues at the no-contact order hearing. *State v. Pettit*, 885 N.W.2d 221 (Table)(Iowa Ct. App., June 15, 2016) at p. 5. The *Pettit* court quoted the following language from *State v. Bruegger* when it held that a no contact order can be challenged at any time as an illegal sentence:

> '[A] challenge to an illegal sentence includes claims that the court lacked the power to impose a sentence or that the sentence itself is somehow inherently legally flawed, including claims that the sentence is outside the statutory bounds or that the sentence itself is unconstitutional.'

Id. at 6 (*citing State v. Bruegger*, 773 N.W.2d 862, 871 (Iowa 2009)). The court of appeals expressly held that Pettit's claims fit this definition. *Id.*

The State does not distinguish between *Pettit* and the current case, and the State does not argue the *Pettit* court was wrong. Rather, the State simply diverts this court's attention from the *Pettit* court's holding by discussing the court of appeals' holding in *State v. Hall*, which was cited by the *Pettit* court. *Hall* is factually distinguishable from the present case, but *Pettit* is directly *en pointe*. The merits should be addressed here just as they were in *Pettit*.

B. Argument.

The State does not directly address the failure of Iowa Code section 664A.8 to define and allocate the burden of proof. The State attempts to sidestep this issue by focusing on the word "threat" in section 664A.8 and by attempting to factually distinguish the *Wiederien* case. For purposes of this argument, the definition of the word "threat" is not the issue. The issue is which party has the burden of proof, and what standard of proof applies, when the State files a motion to extend a no contact order under section 664A.8? This issue has never been directly addressed by this court, and the State does not argue otherwise.

The State correctly notes that the no contact order in *Wiederien* was extended after an acquittal, but this was not central to the court's analysis. The *Wiederien* court was clear that the legislature's failure to define the

burden of proof is what led to an "arbitrary and discriminatory enforcement of the statute on an ad hoc and subjective basis." *State v. Wiederien*, 709 N.W.2d 538, 542 (Iowa 2006).

The State makes the puzzling assertion that section 664A.8 "provides express guidance on when such extensions are appropriate, and in readily understandable terms." State's Brief, p. 38. The State fails to explain which party has the burden of proof and what standard of proof applies when it asks a court to deprive a defendant of liberty by extending a no contact order for a term of five years under section 664A.8. There is no "express guidance" in the statute or the case law.

V. CHAD'S DUE PROCESS RIGHTS WERE VIOLATED BECAUSE A ONE-YEAR NO CONTACT ORDER WAS EXTENDED FOR FIVE YEARS BASED SOLELY ON A PROTECTED PERSON'S ASSERTION THAT SHE REMAINS "IN FEAR" OF CHAD.

A. Preservation of Error.

This Court may address the merits of this issue for the same reasons stated in the preceding section.

B. Argument.

In the previous section, Chad argues that section 664A.8 is unconstitutionally vague because it fails to define and allocate the burden of proof. In this section, Chad argues that section 664A.8 is unconstitutionally vague for the additional reason that it does not place the defendant on notice

as to what must occur in order for the defendant to "no longer pose a threat" to the protected person. Contrary to the State's assertion, these two arguments are not the same, and should be addressed separately.

The State concedes that the language in section 664A.8 is "flexible." It is so flexible, in fact, that a protected person need only recite that he or she subjectively remains "in fear" of the defendant for a one-year no contact order to be extended for an additional five years. There is absolutely nothing in section 664A.8 that provides guidance to a defendant as to whether there is *anything* he can do to prevent having a one-year no contact order extended for a period of five years. The State simply dismisses this deficiency as inconsequential under the guise of "flexibility."

VI. WHERE A NO CONTACT ORDER IS IMPOSED FOR LESS THAN FIVE YEARS, THERE MUST BE A CHANGE OF CIRCUMSTANCES TO EXTEND THE NO CONTACT ORDER UNDER SECTION 664A.8.

A. Preservation of Error.

This issue may be addressed on the merits for the reasons stated in Chad's initial brief, and those arguments will not be repeated here.

B. Argument.

The State, while arguing elsewhere that chapter 664A should be read *in pari materia*, ignores the concept here. In doing so, the State misapprehends Chad's reference to a change in circumstances. The State

also ignores the fact that the term of the initial no contact order in this case was one year. When sections 664A.5 and 664A.8 are read in conjunction with one another, it becomes clear that the legislature did not intend for a one-year no contact order to be extended for a term of five years without some intervening activity or event that would warrant an extension.

The State speculates that "there may be rational reasons for imposing a no contact order with a shorter duration, with the intent of re-assessing the situation at a later date to determine if a limited 'cooling off' was enough to diffuse tensions and neutralize the threat." State's Brief, p. 42. The State also analogizes a one-year no contact order to "shock probation." *Id.* It is disingenuous, if not repugnant, for the State to ask this court to speculate that there was some unspecified reason for a one-year no contact order in this case when the State *knows* that it agreed to a one-year term precisely because the underlying offense did not justify a five-year term.

Furthermore, if a one-year no contact order was imposed for "shock" value, or for a "cooling off" period, then certainly some activity or event must intervene to show that the defendant has not been sufficiently shocked or cooled. Otherwise, a later reassessment to determine whether the "cooling off" period was enough to diffuse tensions and neutralize the threat would be meaningless.

The State attempts to distinguish *State v. Olney* from the present case, but the State fails to explain how the extension of a no contact order is any different than a motion to dissolve, vacate, or modify an extended no contact order. The State draws a distinction without a difference.

The State cites *State v. Petro* for the proposition that section 664A.8 does not require a victim to allege or prove a new incident of domestic abuse or a violation of the existing order to satisfy the continuing threat element. *State v. Petro*, No. 16-1215. (Iowa Ct. App., May 3, 2017). But in *Petro*, the initial no contact order was entered for a five-year term, not a one-year term. The defendant in *Petro* had also previously violated the no contact order, and the underlying crime involved overt threats of physical violence. *Id.* *Petro* therefore bears no resemblance to the present case. Having said that, whether or not section 664A.8 requires proof of a new incident, fundamental fairness requires some evidence of a continuing threat other than a protected person's subjective assertion he or she remains "in fear," before a one-year no contact order can be extended for an additional five years.

VII. THERE WAS INSUFFICIENT EVIDENCE TO FIND THAT CHAD CONTINUES TO POSE A THREAT TO THE SAFETY OF THE PROTECTED PERSONS.

A. Argument.

The State cites no evidence supporting the idea that Chad would

continue to pose a safety threat to the protected persons in this matter. It is apparent that the State would simply like to have the unfettered power to impose no contact orders in perpetuity. This is clearly the end result if a one-year no contact order may be extended for a term of five years based upon nothing other than a bare assertion by a protected person that she remains "in fear."

The State quotes a portion of the hearing transcript where Amy Staudt testified about "safety issues." However, at no point in time did Ms. Staudt ever specify the nature of such "safety issues," the period of time in which such issues were present, or any facts that would support a safety concern at the expiration of the one-year no contact order. In fact, Ms. Staudt acknowledged that physical safety was *never* an issue. (Transcript p. 8, ln. 22 – p. 10, ln. 21, App. 74-76).

The State's position is over-reaching and oppressive. On the one hand, the State argues that Chad must establish that the Staudts will continue to be "safe" if the no contact order is allowed to expire. State's Brief, p. 47. On the other hand, the State offers no legal standard or any guidance whatsoever as to how Chad could *ever* "establish" that the Staudts would "continue to be safe."

At the hearing in this matter, Chad did nothing to minimize the nature

of the underlying offense, and he accepted full responsibility. However, the nature of the underlying offense is not immaterial. This matter relates to a dispute between two families over high school wrestling. Chad's offense involved sending his son to the state wrestling tournament, where the protected persons would be present. That is the record evidence in this case. There were no *threats* of physical violence, let alone *acts* of physical violence. This is not a domestic abuse case, and the underlying offense justified a one-year no contact order, not a five-year no contact order.

The State characterized Chad's testimony as constituting "self-serving assurances," but his assurances were corroborated by Amy Staudt when she testified that Chad has fully complied with the no contact order and has not presented any threat of harm. Although the State criticizes Chad's testimony as "self-serving," the State fails to specify the circumstances under which Chad could have avoided a five-year extension of a one-year no contact order resulting from his decision to send his son to the state wrestling tournament. A protected person's self-serving assertion, without more, does not constitute substantial evidence to support the magistrate's finding.

VIII. THE EXTENSION OF THE NO CONTACT ORDER MUST BE VACATED BECAUSE IT VIOLATED A COURT-APPROVED PLEA AGREEMENT.

A. Preservation of Error.

The State incorrectly states that Chad did not raise the breach of the plea agreement before the magistrate. The following statements were made by Chad's attorney before the magistrate:

> The agreement, the Court-ordered agreement, the intent was for the no contact order to last for one year. Chad did not agree that – that the no contact order would continue or extend beyond the one year period."

(Transcript p. 13, ln. 24-p. 14, ln. 2, App. 79-80). The following additional statements were made at the hearing:

> I'd just reiterate that the agreement was for a one-year no contact order. Chad has upheld – upheld his end of the bargain.

(Transcript p. 32, lns 13-15, App. 98). This issue was raised before the magistrate, and the magistrate necessarily ruled upon it when she extended the one-year no contact order for a term of five years. For the additional reasons previously stated, the court may address this issue on the merits.

B. Argument.

Once again, the State speculates as to the magistrate's intentions in initially entering a one-year no contact order when chapter 664A permitted a five-year term. The only evidence presented at the hearing was that Chad

agreed to a one-year term. The State presented no evidence to the contrary. So even though the State is not willing to meet its professional obligation to acknowledge the plea agreement was for a one-year no contact order, the only record evidence is that the deal was for a one-year term.

The State argues that Chad did not rely to his detriment on the State's agreement to impose a one-year no contact order. The State ignores the plain and obvious fact that Chad is now in a worse position for having agreed to a one-year term than if a five-year term had been imposed in the first place.

The State makes the nonsensical argument that Chad could not have relied on the "tentative" expiration date of the no contact order when he made his decision to plead guilty because the no contact order was issued after discussion of the plea agreement with the State. But discussion of the plea agreement necessarily included the one-year term, and Chad did rely upon the prosecuting attorney's representation that the term would be for one year when he entered his Plea of Guilty. The subsequent issuance of the no contact order by the magistrate is immaterial to Chad's reliance. Given the repeated references in chapter 664A to five-year no contact orders, it is beyond question that the State agreed to a one-year no contact order as part of a plea agreement, and that the order would expire upon full compliance.

CONCLUSION

For all of the reasons set forth above and previously, this court should vacate the rulings of the lower courts.

Respectfully submitted,

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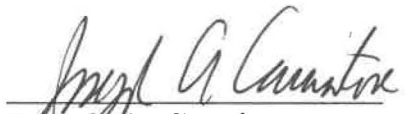
ATTORNEY'S COST CERTIFICATE

I, the undersigned, hereby certify that the true cost of producing the necessary copies of the foregoing Final Reply Brief and Argument was $0.00, and that amount has been paid in full by the undersigned.



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Joseph A. Cacciatore

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CERTIFICATE OF FILING

I, Erin Bullock, hereby certify that I filed the Defendant-Appellant's Final Reply Brief on the 8th day of September, 2017, upon the Clerk of the Iowa Supreme Court, 1111 East Court Avenue, Des Moines, IA 50319, through EDMS.

Erin S. Bullock

CERTIFICATE OF SERVICE

I, Erin Bullock, hereby certify that I served one copy of Defendant-Appellant's Final Reply Brief on the 8th day of September, 2017, upon the following persons through EDMS.

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